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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1505 OF 2007

Chandrakant Butalal Shah,
Indian Inhabitant having my
address at 15/7, Navjivan Society,
Lamington Road, Mumbai 400 008 .. Petitioner

Versus

1. Union of India,
by and through the Joint Secretary
Ministry of Law Justice & Company
Affairs, Aayakar Bhavan, Maharshi
Karve Road, Bombay 400 020.

2. Appellate Tribunal of Foreign
Exchange, having its office at
Janpath Bhavan, 4th Floor, "B" Wing,
New Delhi 110 001.

3. The Special Director,
Enforcement Directorate, having its
office at Janmabhoomi Chambers,
Walchand Hirachand Marg,
Mumbai 400 001. ... Respondents

Mr. S.U. Kamdar with Mr. N.M. Shah for Petitioner.

Mr. A.S. Rao with Mr. Rajendrakumar for Respondents.

**CORAM: F.I. REBELLO &**
**J.P.DEVADHAR, JJ.**
**DATED: AUGUST 06, 2007**

**ORAL JUDGMENT (Per F.I. Rebello,J.):**

. Rule. Heard forthwith.

2. The Petitioner has approached this court to challenge the order dated 22.3.2007 passed by the appellate tribunal for Foreign Exchange. By that

order the Petitioner's appeal was dismissed on the ground of non-compliance of pre-deposit order dated 30.3.2005. The learned tribunal by its order dated 30.3.2005 had directed the Petitioners to make pre-deposit of 20% of the amount of penalty i.e. Rs. 10 lacs.

. The Petitioner by application dated 27.4.2005 had applied for modification of that order. That was dismissed by order dated 31.3.2005. That was challenged by filing Writ Petition being W.P. No. 2033 of 2005. The Petition was disposed of by order dated 11.8.2005. It is the Petitioner's case that the said order did not correctly reflect what had transpired on that date. The Petitioner sought clarification wherein the Division Bench was pleased to pass an order being Order dated 24.3.2007. According to Petitioner by that order he was allowed to withdraw the Petition with liberty to approach the Appellate authority. Pursuant to that it is the case of the Petitioner that he preferred Misc. Application which was dated 28.2.2007. The same was served on department on 9.3.2007. By that application, the Petitioner had sought review and/or modification of the order dated 31.5.2005. However, inspite of the fact that the said application was pending, the appeal was disposed of for failure of pre-deposit by order dated 22.3.2007. It is this

order which is the subject matter of the present Petition.

3. The real issue would be whether it was open to the Petitioner to have applied for recalling of the order dated 30.3.2005 and consequently whether the appeal could have been disposed of without considering the application which was pending. The order of 22.3.2007 was passed on the ground that there was failure to deposit, after hearing the counsel for the Petitioner herein. It is contended on behalf of the Petitioner that the appeal could not have been disposed of without first considering the application which was pending before the tribunal for recalling of the order dated 30.3.2005.

4. The first question that we have to consider is whether a court or tribunal has suo motu or inherent or implied power of procedural review if the said power has not been specifically conferred. In our opinion,the issue is no longer res integra having been concluded by the judgment of the Supreme Court in Grindlays Bank Vs. Central Government Industrial Tribunal and Others, 1980 (Supp) Supreme Court cases 420. We may gainfully reproduce the following observations made in Para 13 :

"... The expression "review" is used in the

> two distinct senses, namely (1) a procedural review, which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the fact of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process and such power inheres in every court or Tribunal."

. It will thus be clear that there is inherent or incidental power for procedural review in courts and tribunals to do justice. This has been followed by the Supreme Court in J.K. Synthetics Ltd. Vs. Collector of Central Excise, 1996 (86) E.L.T. 472 (SC) which was a case under the provisions of the Central Excise Act, 1944 read with CEGAT (Procedure) Rules, 1982 The Supreme Court was pleased to note that the tribunal in order to make the grant of

final relief effective, would have power to grant interim relief considering the judgment of the Supreme court in Income Tax Officer Vs. M.K. Mohammed Kunhi 71 ITR 815. Reliance was therein placed in the judgment of Grindlays Bank (supra). The court held that CEGAT even in the absence of specific provisions would have the power to apply for recall of an exparte order.

. At this state we may consider the judgment cited on behalf of the respondents in Baron International Ltd. Versus Union of India 2004 (163) E.L.T. 150 (Bom.), There the issue pertained to modification of the order. The learned tribunal held that there was no power to CEGAT to review its order and the modification can only be asked in the event of change of circumstances. This observations would be in the context of substantive review and not procedural review considering the judgment of the Supreme Court in Grindlays Bank (supra). In so far as a case where an interim order is passed, after hearing the parties, that order can be modified only in the event there is a change in circumstances. That would be an incidental power in a Tribunal when it has the power to grant interim relief to do complete justice.

5. With the above background we may now consider

the relevant provisions of the FEMA Act to find out whether there is power of review conferred on the tribunal.

6. Section 28(2)(f) of the FEMA 1999 reads as under:

> "28. Procedure and powers of Appellate Tribunal and Special Director (Appeals) : (1).....
>
> (2) The Appellate Tribunal and the Special Director (Appeals) shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely :- .....
>
> (a) .....
>
> (f) reviewing its decisions:"

. It is therefore, clear that under this section, the Appellate tribunal has been conferred the power to review its own decisions.

7. From the above it will be clear that the power of review has been specifically conferred on the tribunal under the FEMA Act, 1999. Once there be power, of judicial review, both procedural and substantive, the question is whether this court should exercise its extra ordinary jurisdiction. In the instant case, as contended, the entire case of the Petitioner is that the appeal was dismissed for failure of pre-deposit even though the Petitioner had moved an application for recalling the order of pre-deposit and which application was pending before the tribunal before the impugned order was passed dismissing the appeal for failure of pre-deposit. Considering that the tribunal has power to review, in our opinion, this will not be a fit case for us to exercise our extra ordinary jurisdiction.

. It will be open to the Petitioner to apply to the tribunal for review of the order according to law. The respondents for the period of eight weeks from today, not to execute the order.

8. Rule discharged. There shall be no order as to costs.

**(J.P.DEVADHAR, J.)** **(F.I.REBELLO, J.)**